National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

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Great Western Bank, Case 12-CA-16886

506-0170, 506-4033-0300, 506-4067-3000, 506-6090-4200, 506-6090-4900, 512-5006-5096, 512-5081-7000, 512-5090-2500, 625-2233-7200, 625-7728-2800

This Section 8(a)(1),(3) and (4) case was submitted for advice on: (1) whether an employee engaged in protected, concerted activity under Meyers Industries, Inc.[(1)] by discussing with other employees the manner in which the Employer was applying its terms and conditions of employment to her and other employees; and (2) whether the Employer violated the Act by maintaining and requiring employees to sign an agreement to submit any employment disputes to binding arbitration and to waive all rights to initiate other legal proceedings.

FACTS

Great Western Bank (the "Employer") employed Laurie Fathi, the Charging Party, from April 1991 through March 1994 and from April 14 until October 28, 1994. The Employer's workforce is not represented by a union. In December 1993, Fathi began receiving disciplinary counseling concerning her tardiness, lunch scheduling and failure to follow the proper chain of command. At that time Fathi advised management that she had a personality conflict with her direct supervisor. Subsequent to her counseling, Fathi took a stress disability leave of absence. While on leave, Fathi telephoned co-workers at their homes to discuss lunch schedules, the dress code, the Employer's policy on personal calls and the employees' feelings about certain supervisors. These calls were corroborated by employees though none could recall the specifics discussed.

Fathi returned to work after her leave of absence and continued these work-related conversations. Fellow employees agreed with Fathi's complaint that Fathi's supervisor picked on Fathi for everything. Employee Lacey told the branch manager that she was concerned about Fathi's health and need for professional counseling. The Employer began soliciting information from the employees about Fathi's conversations concerning work-related problems. Shortly thereafter, the Employer counseled Fathi about making telephone calls to fellow employees' homes, claiming that the employees had complained. The employees deny making such complaints to the Employer.

Fathi voluntarily terminated her employment with the Employer in March 1994.[(2)] The Employer rehired her about a month later. Upon Fathi's re-hire on April 14, she signed a binding arbitration agreement waiving her right to use any legal proceedings, except arbitration, to redress employment disputes. The agreement provided in pertinent part:

Any and all disputes giving rise to claims for civil damages or other civil remedies, which involve employment or termination of employment with Great Western shall be submitted to final and binding arbitration...Arbitration shall be in lieu of any and all other civil legal proceedings, including, but not limited to, administrative proceedings and lawsuits...I understand and acknowledge that I am waiving any right I may have to resolve employment disputes through trial by jury...This Agreement is intended to cover all civil claims,..., including and not limited to claims of employment discrimination on the basis of race, sex, age, religion, color, national origin, disability and veteran status (including, claims under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act and any other local, state or federal law concerning employment or employment discrimination), claims based on public policy, statutory claims and claims against individuals or other entities...I agree that the decision of the arbitrator shall be final and binding on both parties, shall be the exclusive remedy of the parties...."

Early in October, Fathi questioned her co-workers as to whether they had been counseled about long lunches, reversal fees,

tardiness, personal phone calls and permission to use the rest room. The co-workers admitted that they had similar work problems but said that unlike Fathi, they had not been counseled or disciplined because of these problems. The co-workers and Fathi's supervisor agreed that management was watching Fathi closely.

On October 21, the branch manager and assistant branch manager counseled Fathi for taking long lunches/breaks, personal phone calls and tardiness. Shortly thereafter, management met with Fathi's co-workers and instructed them not to discuss work-related problems with Fathi. The branch manager stated that she would not tolerate Fathi talking to her co-workers about work problems or anything in or out of the workplace.

On October 24, management questioned an employee as to whether Fathi had asked her if management had disciplined her for taking a long lunch with Fathi. When the employee confirmed that Fathi had made such an inquiry, the assistant branch manager said, "Thanks, that's all we needed to know." The following day, the Employer placed Fathi on probation for insubordination, excessive tardiness, disruptive behavior, personal phone calls, closing of her teller window and inquiring of other employees as to whether or not they had been counseled. Fathi was advised in the probationary memo that only her performance should be her concern, not her co-workers' performances.

On October 28, the Employer discharged Fathi for insubordination after she returned a personal call to her son on non-break time when her supervisor instructed her not to do so.

The parties are not arbitrating the dispute concerning Fathi's discharge. Initially, Fathi agreed to submit the dispute over her discharge to arbitration. However, the Employer has taken the position that since Fathi filed a charge with the Board, she has waived her right to arbitration.

The Region has concluded that the Employer violated Section 8(a)(1), inter alia, by telling other employees not to get involved in Fathi's problems and to stop speaking to her, by interrogating other employees about their conversations with Fathi, and after Fathi's discharge, by telling employees that they were not to speak to her, and if Fathi's activity is protected and concerted, by warning and placing Fathi on probation in part because she had asked other employees if they had been counseled for the same deficiencies for which she had been counseled and by discharging Fathi ostensibly for insubordination when she called her son after she was directed not to do so.

ACTION

We concluded that the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) of the Act because it discharged Fathi for engaging in protected, concerted conduct in soliciting information from her co-workers about the Employer's possible disparate application of work rules.[(3)] The complaint should also allege that the Employer violated Section 8(a)(4) and (1) because it maintained and required Fathi to sign an arbitration agreement whereby the employee agreed to forego pursuing her claims before the Board.

1. Protected, Concerted Activity

In Meyers I, the Board held that in order for activity to be concerted, it must be "engaged in with or on the authority of other employees and not solely by and on behalf of the employee himself...."[(4)] The Board thereby overruled Alleluia Cushion Co., 221 NLRB 999 (1975), and cases which held that the individual assertion of a matter "of common concern" to other employees was concerted activity. The Board cautioned, however, that

> the definition of concerted activity we set forth . . . is by no means exhaustive. We acknowledge the myriad of factual situations that have arisen, and will continue to arise, in this area of the law.
>
> We also emphasize that, under the standard we now adopt, the question of whether an employee engaged in concerted activity is at its heart, a factual one ....[(5)]

In Meyers I[(6)] and Meyers II,[(7)] the Board reaffirmed Root-Carlin, Inc., 92 NLRB 1313, 1314 (1951), and other cases holding

that "the guarantees of Section 7 extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step." Thus, the "activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." Owens-Corning Fiberglas Corp. v. NLRB, 407 F.2d 1357, 1365 (4th Cir. 1969). Such individual action is concerted as long as it is "engaged in with the object of initiating or inducing...group action...." Mushroom Transportation Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1963).

In Meyers II the Board made it clear that there are two separate tests to be met in establishing Section 7 coverage: (1) whether the purpose or subject matter of a particular action was one with which a group was likely to be concerned, reflecting the "mutual aid or protection" clause of Section 7, and (2) whether the action has some linkage to group action, which reflects the idea that the action must be taken in "concert." (8)

The Board has also held that the object of inducing group action need not be express (9) and that an employee's unsuccessful effort to enlist the support of other employees does not render the disciplined employee's action unconcerted activity. (10) Moreover, the fact that only the complaining party would be the immediate or direct beneficiary of his complaint does not detract from the concerted nature of his solicitation to the other employees. (11) In Boese Hilburn Electric Service Co., 313 NLRB 372 (1993), two employees had engaged in several discussions complaining about the unfairness of the employer's failure to pay one of the employees maternity benefits. The Board found that the airing of complaints of this type constituted protected, concerted activity. (12)

In Needell & McClone, P.C., 311 NLRB 455, 456 (1993), the ALJ, whose decision was adopted by the Board, held that an employee who talked with other employees about the preferential treatment given another employee was engaged in protected, concerted activity. The employees were specifically concerned about having heavier workloads and receiving lateness warnings while the favored employee was not subject to the same work assignments or attendance rules.

However, as the Supreme Court recognized in NLRB v. City Disposal Systems, 465 U.S. 822, 833 n. 10 (1984), "at some point an individual employee's actions may become so remotely related to the activities of fellow employees that it cannot reasonably be said that the employee is engaged in concerted activity." The Court further noted the Board's view that Section 7 does not protect personal "griping." (13)

Thus, in HCA/Portsmouth Regional Hospital, supra, the Board found that the charging party had two problems with her supervisor. One problem -- the supervisor's perceived failure to share in the work load and respond adequately to a staffing shortage -- was a matter of mutual concern to other employees so that the charging party's effort to gain the support of other employees to protest the supervisor's management style was deemed concerted. However, the Board characterized as "purely personal" the charging party's concern that this new supervisor had ceased the preferential treatment that the charging party had received from the previous supervisor. (14) The Board noted, at 919, that the charging party's recklessly and maliciously spreading false rumors about the supervisor's past employment history was a "single-minded" effort to get rid of the supervisor in order to resolve the charging party's personal problem with the supervisor's not giving her preferential treatment. The Board found that this conduct "no longer had anything to do with resolution of the alleged mutual concerns about employees' working conditions."

In the instant case, we conclude that Fathi's conversations with her co-workers concerning the Employer's disparate enforcement of its work rules fall within the protection of Section 7.

First, Fathi's inquiries related to a group concern which brings her conduct within the "mutual aid or protection" clause of Section 7. The Board has long recognized that complaints arising out of the employment relationship, such as those regarding wages, health, safety and physical comforts, are group concerns. (15) Here, Fathi questioned her fellow employees as to their treatment under the Employer's employment rules to assess whether management was fairly applying those rules to her. Fathi solicited information when it began to appear to her that other persons guilty of transgressing the same rules as she was alleged to have broken were not being reprimanded or counseled as she was. As all employees are subjected to these same rules, the Employer's disparate application of these rules and its handling of an employee's dispute under these rules is of concern to all

employees to whom these rules apply.[(16)] Moreover, although Fathi is the only employee presently adversely affected by the disparate enforcement of the rules, there is the real possibility that at some point in the future the Employer could select one of the other employees for unfair treatment.[(17)]

Second, Fathi's conversations were concerted because of their linkage to group action as required by Meyers I and II. As Meyers II makes clear, a conversation can constitute concerted activity if it is engaged in with the object of preparing for group action or has some relation to group action in the interest of the employees. Before Fathi complained directly to management, she first talked to her fellow employees about the Employer's manner of enforcing its workplace rules. It is clear that, as in Boese Hilburn Electric Service and Needell & McClone, employees are engaged in concerted activity when they have discussions about the unfairness or inconsistency of the employer's application of its terms and conditions of employment.

The facts also show the other employees were interested in Fathi's complaints and agreed that she was being treated unfairly, a factor the Board noted in Boese Hilburn Electric Service.[(18)] In this regard, we note that employee Lacey also showed her support for Fathi by talking to the branch manager about her concern that Fathi had to seek professional counseling because of her work situation. Moreover, there is no evidence that Fathi's fellow employees disavowed interest in her concerns about disparate treatment.[(19)]

Fathi's failure to expressly seek support from her co-workers does not preclude a finding of concerted activity. As set forth above, the Board does not require that an employee must express an object of inducing group action. We would argue that where, as here, Fathi telephoned fellow employees to discuss the discipline that the Employer had dealt her and to seek information on whether other employee were being disciplined in the same manner, these conversations were about a common concern and a necessary predicate for group action within the meaning of Meyers. In any event, the Employer reacted to Fathi's activity by enforcing an overly broad rule which restricted Fathi's co-workers from discussing with her the Employer's application of its work rules. This reaction had the effect of thwarting or nipping in the bud any group action in or out of the workplace relating to the assessment of the Employer's application of work rules.[(20)]

The Employer claims that Fathi's conversations with other employees were not protected under the Act and were merely personal griping under NLRB v. Koch Supplies, Inc., 646 F.2d 1257 (8th Cir. 1981).

In Koch, 249 NLRB 1144 (1980), the Board relied upon the finding of the ALJ that, upon learning the particulars of a new employee's employment package, which violated written policy, employee Musy discussed the issue with fellow employees. One of the fellow employees suggested that Musy complain to management that the new employee's more favorable terms violated company policy, had been the subject of employee concerns, and would be detrimental to employee morale. The Board affirmed the ALJ's finding that Musy had been engaged in concerted activity, not personal griping, and that the employer discharged Musy because she expressed concerns about the new employee's employment package.[(21)]

However, on appeal, the Eighth Circuit denied enforcement, on the basis that no group action was ever discussed and all of the employees who testified denied any interest in Musy's gripes, 646 F.2d at 1259. Thus, in the court's view, without some indication that Musy intended that her activities would relate to group action, the Board's theory that subjects such as vacations are generally a matter of common interest was not sufficient to sustain the finding of a Section 8(a)(1) discharge. The court, without explanation, obviously discounted the ALJ's and Board's factual finding that the employees had discussed the issue among themselves, and that at least one employee had told Musy to take the complaint to management. The court thereby eliminated the factual link to group action necessary for concerted activity. In any event, the Board decision, not the court's, is applicable to this case.

In sum, it is clear that where the facts establish, as here, that employees discussed among themselves and expressed concern about the unfairness of an employer's disparate application of its terms and conditions of employment to an individual employee, the Board will find that the employees were engaged in protected, concerted activity, as it did in Koch, Needell & McClone, and Boese Hilburn Electric Service.[(22)]

2. Arbitration Agreement[(23)]

We conclude that the Employer violated Section 8(a)(1)

and (4) by maintaining the arbitration agreement and insisting that employees sign that agreement as a term and condition of employment. The agreement impermissibly requires employees to waive their statutory right to file charges with the Board.

Section 10(a) of the NLRA provides in relevant part that the Board

is empowered...to prevent any person from engaging in any unfair labor practice...This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise.[(24)]

From its inception, the NLRA has permitted the Board to treat individual contracts of employment, when used to frustrate the exercise of statutory rights, as either void or voidable. In National Licorice Co. v. NLRB,[(25)] after the union obtained majority status, the employer refused to grant the union recognition and instead circulated a petition for a bargaining committee. The bargaining committee negotiated individual contracts between the employer and every employee, in which the employees relinquished the right to strike and the right to demand a union-security clause or a written contract with any union. While the contracts granted employees the right to arbitration as to wages and hours, they expressly foreclosed arbitration as to discharge. The Supreme Court found that the individual employment contract imposed illegal conditions on the exercise of Section 7 and 8 rights. The effect of the clause barring arbitration of discharges was to "discourage, if not forbid," the presentation of grievances, by discharged employees to the employer through a union, or in any way except personally.[(26)]

Consistent with National Licorice, the Board has regularly held that an employer violates the Act when it insists that an employee waive his statutory right to file charges with the Board or to invoke his contractual grievance-arbitration procedure.[(27)] A union similarly violates Section 8(b)(1)(A) when it conditions use of the union's hiring hall on the signing of a form containing a waiver of an employee's right to sue the union because of an employment dispute.[(28)]

The arbitration agreement involved in this case has precisely the same unlawful effect as these waiver demands or agreements long condemned by the Board. The arbitration agreement requires, as a condition of employment, that the employee subordinate his/her right to file charges with the Board concerning employment to the Employer's unilaterally chosen arbitration process. Moreover, it is immaterial that the agreement may be unenforceable because employees could not be presumed to know that their waiver would not be enforced and they would be chilled in exercising their Section 7 and 8 rights. See Construction & General Laborers, Local 304, supra, 265 NLRB at 607:

Employees cannot be presumed to know that their waiver would be held unenforceable were they to test their rights by filing a Board charge against the Union. As the [Supreme] Court said in analogous circumstances in [NLRB v. Industrial Union of] Marine & Shipbuilding Workers,[319 U.S. 418 (1968)], regarding the exhaustion of remedies requirement therein: "the difficulty is that a member would have to guess what a court ultimately would hold. If he guessed wrong and filed the charge with the Board without exhausting internal union procedures, he would have no recourse against the discipline of the union. That risk alone is likely to chill the exercise of a member's right to a Board remedy and induce him to forego his grievance or pursue a futile union procedure." 391 U.S. at 425 (emphasis supplied).

Hence, a Section 8(a)(4) and (1) complaint is warranted, absent settlement, as to the Employer's maintenance of the arbitration agreement, as well as its requirement that employees must sign the arbitration agreement as a term and condition of employment.

We note that the complaint in Kinder-Care, supra, alleged only a Section 8(a)(1) violation, not an additional Section 8(a)(4) violation. However, the rule in Kinder-Care, which stated that employees had to bring their employment-related disputes to the employer "immediately,"[(29)] did not explicitly bar employees from asserting their statutory rights, even though the Board construed the rule as having such an effect. On the other hand, in Great Lakes Chemical Corp., supra, where employees were required to sign a statement waiving their rights to bring any legal action against the employer as a result of their layoff or termination, the Board affirmed the conclusion of the ALJ, at 622, that the employer violated Section 8(a)(4), as well as Section 8(a)(1), by conditioning employment on the signing of the waiver. Like the waiver demand in Great Lakes Chemical, supra, the arbitration agreement in this case explicitly requires an employee not to assert his statutory rights before using the

Employer's compulsory arbitration procedure. The rule thus deters employees from seeking to file charges with the Board, because the rule requires those employees to resort to the Employer's arbitration procedure instead of filing charges or otherwise seeking to vindicate their employment rights. Such an open attack on an employee's right to seek access to the Board is appropriately litigated through a Section 8(a)(4) allegation.(30) Hence, a Section 8(a)(4) complaint is warranted because, even though Fathi was not discharged for filing a charge with the Board, the mere maintenance of the arbitration agreement is violative of the Act because it can chill access to the Board.

The Employer contends that the arbitration agreement has no prohibitions against filing claims with the Board and did not prevent Fathi from doing so. The clear language of the agreement is contra. Thus, the agreement specifically states that, "Arbitration shall be in lieu of any and all other civil legal proceedings," including civil claims of "federal law concerning employment" or "statutory claims." Moreover, the Board affirmed an ALJ's rejection of a similar argument in Construction and General Laborers, Local 304, supra, at 607, noting that the fact that the agreement barred suits as to any matter meant that it was intended to bar unfair labor practice charges, even though the Board was not named in the agreement. Indeed, the Board has construed even vaguer language as requiring employees to waive their statutory rights to file charges. Thus, in Kinder-Care Learning Centers, supra, the employee handbook contained a "parent communication rule" that stated that it was "essential" that employees bring their employment-related complaints to the employer "immediately" or use the company's problem-solving procedure; the penalty for failure to follow this procedure was discharge. The employer required employees to sign copies of this "parent communication rule," acknowledging that they had received a notice of the rule. The Board specifically found, at 1172, that the ALJ "erred" in failing to find that this rule unlawfully interfered with employees' statutory rights to bring their complaints to persons and entities other than the company, "including a union or the Board" even though the rule did not "on its face prohibit employees" from such actions. The Board further concluded, that the rule was unlawful because it "conflicts directly with the statutory policy of facilitating the ability of employees to organize and bargain collectively" and "tends to inhibit employees from banding together...." Ibid.(31) Therefore, the employer also violated the Act by requiring employees to sign a copy of the rule, thus acknowledging their adherence to the rule. Id. at 1178.

For all of the above reasons, we conclude that the Employer violated Section 8(a)(4) and (1) by insisting that, as a term and condition of employment, employees agree to waive their statutory rights to file charges with the Board and by maintaining such an agreement.

CONCLUSION

In sum, we conclude that the Region should issue a complaint, absent settlement, alleging that the Employer violated Section 8 (a)(1) by unlawfully discharging Fathi for engaging in protected, concerted activity, and Section 8(a)(4) and (1) by requiring employees to sign a binding arbitration agreement as a term and condition of employment and by maintaining such an agreement. The Region should dismiss the Section 8(a)(3) charge, absent withdrawal.

We further conclude that the appropriate remedy to seek is one similar to that set forth in Kinder-Care, supra, at 1176, specifically, that the Employer rescind that portion of its employee personnel materials that prohibits employees from filing suit or asserting their statutory rights in an employment dispute before first using the Employer's arbitration mechanism. The Employer must also cease from requiring employees to sign the arbitration agreement as a term and condition of employment. Because this arbitration agreement is a company-wide requirement, this remedy is necessary at all Employer facilities, and the appropriate Board notice should be posted in all facilities where the Employer has required employees to sign the arbitration agreement.(32) The agreement should be expunged from the personnel files of all current employees who had signed the agreement; those employees should be notified, in writing, that the agreements have been removed from their files.(33)

Further, the Employer must reinstate Fathi and provide the standard remedy for an unlawfully discharged employees, including making her whole for any losses she suffered as a result of her termination.

B.J.K.

[1] 281 NLRB 882 (1986), affd. sub nom. Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988), supplementing Meyers I, 268 NLRB 493 (1984), remanded sub nom. Prill v. NLRB, 775 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985).

[2] All subsequent events occurred in 1994.

[3] The Section 8(a)(3) allegation should be dismissed, absent withdrawal. There is no evidence that Fathi engaged in any union activity, and any remedy which would be available under Section 8(a)(3) would be available under Section 8(a)(1).

[4] 268 NLRB at 497.

[5] 268 NLRB at 496-497.

[6] 268 NLRB at 494

[7] 281 NLRB at 882.

[8] 281 NLRB at 884.

[9] Aroostook County Region Ophthalmology Center, 317 NLRB No. 32, slip op. at 3 (April 28, 1995); Whittaker Corp., 289 NLRB 933 (1988).

[10] See HCA/Portsmouth Regional Hospital, 316 NLRB 919 (1995); El Gran Combo, 284 NLRB 1115, 1117 (1987), enfd. 853 F.2d 996 (1st Cir. 1988), where two discharged employees repeatedly, but unsuccessfully, attempted to elicit support from other employees.

[11] El Gran Combo, 284 NLRB at 1117, citing NLRB v. Weingarten, Inc., 420 U.S. 251, 260 (1975); NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505-506 (2d Cir. 1942).

[12] 313 NLRB at 373-374, citing Salisbury Hotel, 283 NLRB 685, 686 (1967); Vought Corp., 273 NLRB 1290, 1294 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986)(employee told coworkers that another employee had been selected for promotion). See also Grimmway Farms, 315 NLRB 1276, 1280 (1995) (employee was engaged in protected, concerted activity when, as representative of a group of employees, he questioned employer representative's treatment of another employee); Manimark Corporation, 307 NLRB 1059 (1992) enf. denied 144 LRRM 2521 (6th Cir. 1993)(an individual employee's airing of complaints to management about working conditions previously discussed with and shared by other employees, where the employer had reason to believe that the individual was not acting alone, is sufficient evidence to find that the employee was engaging in concerted activities).

[13] 465 U.S. at 833 n.10, citing Capital Ornamental Concrete Specialties, 248 NLRB 851 (1980), where no violation was found because there was no evidence that the discharged employee acted in concert with any other employee or that his complaint touched a matter of common concern.

[14] The predecessor supervisor had tolerated the charging party's absenteeism and performance problems, whereas the new supervisor criticized the charging party's performance.

[15] Boese Hilburn Electric Service Company, supra (maternity benefits); Whittaker Corp., supra (wages); Alleluia Cushion Co., Inc., supra (safety); Steere Dairy, Inc., 237 NLRB 1350, 1351 (1978) (pay and working conditions); Dawson Cabinet, 228 NLRB 290 (1977), enf. denied 566 F.2d 1079 (8th Cir. 1988)(discrimination in wages based on sex); Pioneer Natural Gas Company, 253 NLRB 17, 23 (1980) (racial discrimination); El Gran Combo, supra (distribution of proceeds from an album); Koch Supplies, Inc., 249 NLRB 1144 (1980), enf. denied. 646 F.2d 1257 (8th Cir. 1981) (employment benefit package).

[16] See, e.g., Needell & McClone, supra. Fathi's efforts to determine whether the Employer was applying its rules to her and to other employees in a consistent manner distinguishes this case from HCA/Portsmouth Regional Hospital, supra, where the charging party, who had previously received preferential treatment, reacted to a new supervisor's efforts to make her subject to the same employment rules and standards applicable to other unit employees by maliciously spreading false rumors about the new supervisor's employment history. The Board, in finding that the conduct was unprotected, stressed, at 919, that such defamatory statements render such conduct unprotected.

[17] See Self Cycle & Marine Distributor Co., 237 NLRB 75, 75-76 (1978) (individual employee's dispute with employer over "entitlement to unemployment benefits would be a matter of common interest to other employees, since they might find themselves faced with a situation similar to hers in the future").

[18] 313 NLRB at 373.

[19] Compare HCA/Portsmouth Regional Hospital, supra, 316 NLRB at 926, where other employees disavowed the charging party's statements that she represented their views as to the effort to get rid of the new supervisor.

[20] The Region has concluded that the Employer violated Section 8(a)(1) by enforcing this rule.

[21] 249 NLRB 1144, n. 3.

[22] 313 NLRB at 373.

[23] We recently addressed this issue in Bentley's Luggage Corporation, Case 12-CA-16658, Advice Memorandum dated August 21, 1995.

[24] The House Conference Report No. 510 on H.R. 3020 (the Taft-Hartley Act) reads:

The Senate amendment [to Section 10(a)], because of its provisions authorizing temporary injunctions enjoining alleged unfair labor practices and because of its provisions making unions suable, omitted the language giving the Board exclusive jurisdiction of unfair labor practices, but retained that which provides that the Board's power shall not be affected by any other means of adjustment or prevention. The conference agreement adopts the provisions of the Senate amendment. 1 Legislative History of the Labor Management Relations Act of 1947, p.556.

[25] 309 U.S. 350 (1940).

[26] Id. at 360. See also J.I. Case v. NLRB, 321 U.S. 332, 337 (1944), where the Supreme Court held that individual employment contracts were not a bar to the selection of a collective-bargaining representative, noting, "Wherever private contracts conflict with [the Act's] functions, they must obviously yield or the Act would be reduced to a futility."

[27] See, e.g., Kolman/Athey Division of Athey Products Corporation, 303 NLRB 92 (1991); Kinder-Care Learning Centers, 299 NLRB 1171 (1990); Great Lakes Chemical Corp., 298 NLRB 615, 622 (1990); Retlaw Broadcasting Co., 310 NLRB 984 (1993). Cf. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647, 1655 (1991) where the Supreme Court held that a discharged employee was bound by an agreement to submit his dispute over his discharge to arbitration, noting that, although the employer required the employee to register as a securities representative with the New York Stock Exchange, the agreement to arbitrate grievances was not a term and condition of employment but a requirement of the New York Stock Exchange rules.

[28] Construction and General Laborers, Local 304 (AGC of California), 265 NLRB 602 (1982).

[29] 299 NLRB at 1171.

[30] Congress enacted Section 8(a)(4) to ensure that all persons would be "free from coercion against reporting [possible unfair labor practices] to the Board." Nash v. Florida Industrial Commission, 389 U.S. 235, 238 (1967).

[31] See also Central Security Services, 315 NLRB 239, 243, 253-54 (1994).

[32] See also U.S. Postal Service, 303 NLRB 463 (1991), where the Board found that a nationwide notice posting was necessary to remedy the employer's nationwide policy contained in a manual, to bar employees from exercising their rights under NLRB v. Weingarten, 420 U.S. 251 (1975), even though the complaint attacked only the enforcement of the policy in one facility. The Board stated, at 452 fn.5, "As long as the Respondent's policy remains in effect nationwide, the potential for similar violations to occur throughout the unit as a result of that policy still exists. Thus, it is appropriate that the employees in the unit be made aware of their Section 7 rights vis-a-vis policy."

[33] See br, supra, at 616.